IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HARBOR FINANCIAL GROUP, INC.,	§	CASE NO. 99-37255-SAF-7
DEBTOR.	§	
	§	
JOHN H. LITZLER, CHAPTER 7 TRUSTEE,	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 01-3609
	§	
HOMECOMINGS FINANCIAL NETWORK,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

John H. Litzler, the Chapter 7 trustee of the bankruptcy estates of Harbor Financial Mortgage Corp. and NAF, Inc. (f/k/a New American Financial, Inc.) ("NAFI") seeks to recover as an avoidable transfer under 11 U.S.C. §§ 548 and 550 $169,237.92 paid by NAFI to Homecomings Financial Network, Inc. By order entered October 17, 2002, the court determined on motions for summary judgment that all elements of Litzler's claim under § 548(a)(1) were established except for the requirement of the transfer of an interest of the debtor in property. The court set for trial the issue of whether NAFI transferred an interest it

had in property to Homecomings. The court conducted a trial of that issue on January 23, 2003, and January 28, 2003.

The determination of a complaint to avoid a transfer under 11 U.S.C. §§ 548 and 550 constitutes a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§ 157(b)(2)(H) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rule 9014.

Section 548 only applies to the "transfer of an interest of the debtor in property." 11 U.S.C. § 548(a)(1). NAFI transferred $169,237.92 to Homecomings from a NAFI bank account. A transfer from NAFI's bank account creates a rebuttable presumption that the transfer was of an interest of NAFI in property. In re Southmark Corp., 49 F.3d 1111, 1117 (5th Cir. 1995). Homecomings contends, in rebuttal, that NAFI held the funds in a constructive trust for Homecomings or its parent Residential Funding Corporation ("RFC"). Property subject to a constructive trust would not be considered property of the debtor. 49 F.3d at 1117-1119; In re Maple Mortgage, Inc., 81 F.3d 592, 595 (5th Cir. 1996).

NAFI's Bank Account

NAFI had been in the business of mortgage lending. Geraldo Roman testified that he purchased property located at 5233 West

Strong in Chicago, Illinois. On May 7, 1999, Roman obtained a mortgage loan of $166,500 from NAFI to finance the purchase of the property. The Roman loan was secured by the Strong property.

Roman testified that he sold the Strong property on May 25, 1999, for $235,000. At closing, the purchase price was deposited with the title company. Roman testified that the title company would transfer the funds to NAFI to pay the mortgage in full. The parties stipulated that the mortgage was indeed paid in full.

By check dated August 6, 1999, NAFI paid Homecomings $169,237.92 from a NAFI general account at the Chase Bank of Texas. The parties stipulated that the payment amount constituted the earlier Roman mortgage loan payoff amount.

Milo Segner, a certified public accountant employed by the trustee, testified that NAFI used the general account as a general operating account, paying operating expenses from the account. Segner testified that he knew of no restrictions on NAFI's use of the account. Harbor, NAFI's parent, disbursed funds from a funding account to NAFI's general account. NAFI, in turn, disbursed funds from the general account for a variety of purposes, including the payment of its creditors. Segner testified that funds in that NAFI account would have been available to pay NAFI's creditors.

NAFI had title to the bank account. NAFI had unfettered discretion to pay creditors from that bank account. The trustee

has therefore established a presumption that the transfer of funds by NAFI to Homecomings from the subject bank account constitutes a transfer of NAFI's property. Southmark, 49 F.3d at 1116-1117.

Constructive Trust

The presumption may be rebutted by showing that the funds were held by NAFI in constructive trust for another. 49 F.3d at 1117. Homecomings has the burden of establishing the existence of the constructive trust. 49 F.3d at 1118. State law determines whether the property is subject to a constructive trust. Id. Texas law applies. Under Texas law, a constructive trust is an equitable remedy imposed by law to prevent unjust enrichment resulting from an unconscionable act. To establish a constructive trust, Homecomings must show (1) a breach of a fiduciary relationship or, in the alternative, actual fraud, (2) unjust enrichment of the wrongdoer, and (3) tracing of the property to an identifiable res. 49 F.3d at 1118 n. 31.

There is no evidence of actual fraud.

Homecomings has not established that NAFI owed it or RFC a fiduciary duty, let alone that NAFI breached a fiduciary duty. Rob Caire, Homecomings' vice president and manager of its investor accounting group, testified that RFC purchased mortgage loans from NAFI and that RFC contracted with Homecomings to

service the loans. RFC would acquire mortgages in a pool, with Bankers Trust serving as trustee for the securitization of the mortgages. Caire believed that RFC purchased the Roman mortgage from NAFI and that RFC contracted with Homecomings to service the Roman mortgage.

Caire testified however that he has never seen a contract between RFC and NAFI covering the purchase of the Roman mortgage. Segner testified that he has never seen a contract between RFC and NAFI for the purchase of the Roman mortgage. Caire testified that he has never seen an assignment of the Roman note and mortgage from NAFI to RFC. Segner testified likewise. Caire testified, however, that RFC entered a contract with Homecomings, dated September 15, 1999, covering the servicing of the Roman mortgage by Homecomings. But the Roman mortgage had been paid in full on May 25, 1999, while it was owned by NAFI. Caire further testified that Homecomings began carrying the Roman mortgage for servicing purposes on its books on June 9, 1999. Again, the court observes that the Roman note had been paid in full on May 25, 1999.

In August 1999 Homecomings issued a check to Roman for an escrow refund. On August 10, 1999, NAFI transferred the $169,237.92 to Homecomings. On August 25, 1999, Bankers Trust

executed a satisfaction of the Roman mortgage, which was recorded with the Cook County, Illinois, recorder on September 13, 1999.

Based on this evidence, on May 25, 1999, NAFI held legal and equitable title to the Roman mortgage. Since NAFI held title to the mortgage, neither RFC nor Homecomings had any interest in the mortgage. Compare Maple Mortgage, 81 F.3d at 596. NAFI had full rights therefore to the Roman payment of the mortgage.

The court infers that at some point in time after May 25, 1999, NAFI sold several mortgages to RFC. The court infers that RFC paid consideration for those mortgages. The consideration may have included an amount for the Roman mortgage. RFC may have then pooled mortgages for securitization with Bankers Trust as trustee. RFC arranged for Homecomings to service the Roman mortgage, as if it existed and had been or was to be acquired. But any such sale to RFC occurred after the Roman mortgage had been paid in full. NAFI had no outstanding Roman mortgage to sell to RFC. RFC may have consequently overpaid for the mortgages it purchased, or may not have received full consideration for the purchase price. This evidence and inferences drawn therefrom establishes only that NAFI and RFC may have had a contractual (or debtor-creditor) relationship.

NAFI and Homecomings did not even have a contractual relationship. RFC could assert a breach of contract claim against NAFI. But there was no division of ownership or title in

the Roman mortgage, which had been paid in full. See Southmark, 49 F. 3d at 1117-1118.[1]

Consequently, Homecomings has not established a fiduciary relationship between NAFI and RFC or between NAFI and Homecomings.

Without a fiduciary relationship or fraud, the court does not need to address the unjust enrichment element. The court does observe that after June 9, 1999, Homecomings proceeded as if it was servicing the Roman note. It processed a payment to Roman that represented an escrow refund. RFC later acted as if it owned the mortgage, as Bankers Trust executed the satisfaction of mortgage. But there is no evidence tying this activity to NAFI. If anything, it reflects either (1) lack of care by RFC and Homecomings by acting as if a transfer of the mortgage had taken place without any supporting transfer document reflecting RFC ownership of the Roman mortgage or Homecomings' right to service the loan, or (2) premature implementation of a presumed transaction that had not yet occurred.

Homecomings cannot trace funds that could be subject to a constructive trust. With regard to the Roman payment of the mortgage on May 25, 1999, there is no evidence establishing the

[1]The court notes that the case might be different had RFC purchased the Roman note pursuant to an executed contract and by the payment of consideration before Roman paid the note; NAFI had assigned the note and mortgage to RFC by an executed written conveyance document; and then NAFI received funds from the title company on account of the note.

account to which the title company transferred the funds. On the other hand, the evidence establishes that all the funds in the NAFI account from which the transfer to Homecomings had been made came from a Harbor account. With regard to the RFC payment for whatever mortgages it purchased after May 25, 1999, there is neither evidence of the amount paid nor to whom paid nor to what account deposited.

Based on these findings, Homecomings has not established the elements necessary for the imposition of a constructive trust. Homecomings has therefore not rebutted the presumption that NAFI transferred an interest of the debtor in property to Homecomings.

The trustee has established that NAFI transferred an interest of the debtor in property to Homecomings.

Based on the foregoing,

IT IS ORDERED that the trustee shall have a judgment avoiding the transfer under 11 U.S.C. § 548 and recovering a money judgment of $169,237.92 under 11 U.S.C. § 550. The judgment shall bear pre-judgment interest of 2.95% from the date of the filing of the complaint until the date of entry of judgment and post-judgment interest at the federal rate. Counsel

for the trustee shall prepare a final judgment pursuant to this order.

Dated this 10th day of March, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge